No. 15721

IN THE

United States
Court of Appeals
For the Ninth Circuit

RESERVE LIFE INSURANCE COMPANY, a Corporation,
Appellant,

vs.

DONALD E. MARR, as Guardian of the Estate and Person of MARY I. MARR,
Appellee.

No. 15721

Appellee's Brief

On Appeal from the District Court of the United States for the Eastern District of Washington

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HODGES & HULETT

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JURISDICTION

The jurisdiction of this court as set out in pages 1 and 2 of appellant's brief are correct.

ABSTRACT OF FACTS
PLEADINGS

The case was tried on Plaintiff's Complaint (R. 7), Supplemental Complaint (R. 13), Trial Amendment (R. 25), Defendant's Answer (R. 15), Plaintiff's Reply to Defendant's Affirmative Defenses (R. 23), Trial Amendment in open court (R. 48-49), and the announcement that the Answer of the defendant applied to the Trial Amendment (R. 48-49). The plaintiff through her son and guardian, Donald E. Marr alleged in two causes of actions, the issuance by defendant of two policies No. J448274 and A448274 on May 4, 1954, and their good standing at all times material (R. 7-11). That on January 29, 1956, she suffered a cerebral hemorrhage and was placed in the Jane O'Brien Hospital, Spokane, Washington, on said date and was at all times thereafter, up to and including date of trial, April 19, 1957, a patient therein; (R. 8) that under defendant's insuring agreement No. J-448274 plaintiff was entitled to pay for hospitalization expenses incurred for a 240-day period commencing January 29, 1956, and ending September 24, 1956, at the daily rate of $12.00 or a total of $2,880.00; (R. 8, 9, 13, 25, 26) and that under defendant's agreement No. A-448274, plaintiff was entitled to pay for hospitalization expenses incurred for a 100-day period commencing

September 24, 1956, and ending January 2, 1957, at the daily rate of $8.00 or a total of $800.00 (R. 10, 11, 14, 26).

By its answer defendant admitted the issuance of said policies and their good standing at all times material, and denied all allegations of any benefits thereunder accruing to the plaintiff (R. 15, 16). The balance of Abstract and Pleadings in last paragraph on page 3 of appellant's brief correctly states a summary of defendant's affirmative pleading.

EVIDENCE

Mary I. Marr, the Plaintiff, took out two policies with the Reserve Life Insurance Company, the defendant, on May 4, 1954, which policies were always in good standing at all times mentioned in the evidence. On January 29, 1956, plaintiff had a cerebral hemorrhage, also described as a slight stroke (R. 141, 142, 148). On the recommendation of plaintiff's doctor, Winston Rowe, and her son's physician, Dr. Max Rodney, plaintiff was taken on January 29, 1956, to the Jane O'Brien Hospital in Spokane, Washington. At this time she had a weakness of her right arm and right leg, and was unable to care for herself or feed herself and did not recognize her son. She required medicine to keep her blood pressure under control, a cerebral stimulant, cathartics and general nursing care (R. 142, 143). Later her condition improved and she was able to get out of bed and walk with some help and assistance, but did not have the full use of her right hand and her mental situ-

ation was not entirely clear as she had a type of aphasia. Dr. Rowe testified that she was sick in the general sense of the term from January 29, 1956, continuously and was still in that condition at the date of the trial of April 19, 1957. On Dr. Rowe's last visit the 1st of April, 1957, she she was still taking medicine for blood pressure and a cerebral stimulant and was given general nursing care (R. 143). Witness Dorothy Blage (R. 106) testified that it had only been in the last six months before April 19, 1957, that the plaintiff was, with some assistance, at times able to feed herself.

Jane O'Brien Hospital of Spokane, Washington, for the last twelve or fourteen years has been licensed as either a nursing home or a psychiatric hospital. When Plaintiff entered on January 29, 1956, Jane O'Brien Hospital was licensed by the State Department of Health of the State of Washington as a nursing home and in June, 1956, Mr. Canwell, the present administrator for Havens, Inc., received a license for a psychiatric hospital from the State of Washington, Department of Health, and Jane O'Brien Hospital has so operated since June of 1956. The evidence showed that for approximately five years prior to 1956, that Jane O'Brien Hospital had been licensed as a psychiatric hospital and that the owner, Mrs. O'Brien, voluntarily asked the State Department to change the license to that of a nursing home. The evidence showed that there was no substantial change in the operating procedure when it was licensed as a nursing home and when it was licensed

as a psychiatric hospital. At both times approximately 55 to 60 patients would be in the hospital which has a licensed bed capacity of 61. Jane O'Brien Hospital has never been licensed as a general hospital under the Revised Code of Washington 70.41 Hospital Licensing and Regulations, Chap. 267, Laws of 1955 (R. 92), new legislation first effective in 1955.

John Canwell, one of the owners of Jane O'Brien Hospital, purchased an interest on March 1, 1956. Jane O'Brien Hospital is managed by an experienced hospital man, John Canwell. This witness testified that Jane O'Brien Hospital has been a recognized hospital in the Spokane area for ten years (R. 74). This manager-administrator of Jane O'Brien Hospital has had premedical experience, two years of medicine at St. Louis University and eight years as a hospital management consultant. For eight years he was Vice President of Northwest Hospital Consultants, a hospital managing firm, managing the Prosser Hospital, Kennewick Hospital, Lake Chelan Hospital, (in the State of Washington) St. Joseph Hospital in Montana, Bonner County Hospital at Sandpoint, Idaho (R. 61-73). John Canwell is also business manager for Physicians' Clinical Laboratories, owned by Dr. Oscar Christenson, a medical doctor, (R. 61) and also the pathologist for St. Luke's Hospital in Spokane (R. 62). Jane O'Brien Hospital at all times pertinent to this case had a laboratory, x-ray equipment, permanent and full time facilities for the care of over night resident patients, each of which was under the supervision of the licensed doctor of medi-

cine and had a graduate registered nurse always on duty, with hospital charts for each patient. Jane O'Brien Hospital had an arrangement with Sacred Heart Hospital, a block and a half away, where any surgery on their patients may be performed, but did not have a room for major surgery in the Jane O'Brien Hospital itself. Jane O'Brien Hospital is a hospital with 40 rooms and with 61 beds (R. 77, 78, 79). It houses acutely ill, post-operative cases, orthopedic cases, the aged and on several occasions have had children there, pediatric cases (R. 80). The x-ray pictures that are taken at the hospital are turned over to a qualified radiologist at the direction of the physician for interpretation (R. 80, 81). The administrator of the hospital is professionally responsible to the medical doctors of the patients (R. 88), and that while a laboratory is maintained at the hospital, the samples of blood and various tests are generally sent out to Dr. Oscar Christenson for analysis and handling.

That the defendant has paid a claim on a patient at Jane O'Brien Hospital in 1954-1955. A patient by the name of James Reigart was at Jane O'Brien Hospital and a claim was filed in the amount of $908.43 with the defendant Reserve Life Insurance Company under one of its hospital policies and this claim was paid by the Reserve Life Insurance Company. That policy did not have the same definition of a hospital in it that the present policy does, but Jane O'Brien Hospital was recognized at that time by the Reserve Life Insurance Company as a hospital (R. 109-115).

SUMMARY OF ARGUMENT

The policies of the Reserve Life Ins. Co. taken out by Mary I. Marr to provide for hospital expenses are the type of insurance contracts that are entitled to broad, liberal interpretation so that the dominant beneficent purposes of the contracts will not be avoided. The contracts do not specifically exclude a psychiatric hospital, nor is it stated in either that the policies are only valid if the insured is necessarily confined in a general hospital, and again there is no requirement that the recognized hospital must have all the criteria to be a member of the American Association of Hospitals.

The District Court having made its Findings of Fact, Conclusions of Law, and Judgment after hearing the evidence rightly held that there had been substantial performance by the Jane O'Brien Hospital of the terms of the policies and that Plaintiff was entitled to recover. On this appeal this Court by its decision and those of other jurisdictions must consider all the evidence in the most favorable light for the appellee, and must affirm unless the decision of the United States District Court was clearly erroneous. It is on this basis rather than the position taken by the appellant in its Synopsis of Argument and its Argument that appellee respectfully believes this Court must consider this appeal.

ARGUMENT

While the number of cases construing hospitalization policies is rather limited, they hold that the pro-

visions should be interpreted liberally to the end that equity be done and that the underlying beneficent purposes of the contract be not rendered nugatory. In Vol. I of Appleman, Insurance Law and Practice Section 705—Disability and Specific Loss. This text says:

> "Where there is any ambiguity as to hospital benefits recoverable, a rather liberal construction will be taken to afford protection to the insured."

This text cites in note 27 the case of *Colorado Life Co. v. Polk,* 83 S. W. (2d) 534, and under this section in the Pocket Supplement to Vol. I, Appleman Insurance Law and Practice is cited the case of *McKinney v. American Security Life Ins. Co.,* 76 So. (2d) 630; La. App. 1954, and the case of *Hesse v. U. S. Fidelity & G. Co.,* 21 P. (2d) 1090, 143 Ore 700.

This same rule of construction is set out in the case of *Borglund v. World Ins. Co.,* a Supreme Court of Oregon case decided September, 1957, in 315 P. (2d) 158, the Court held in this disability benefit insurance case where the plaintiff insured lost a leg above the knee that he was not confined to that part of the policy making a specific award for loss of a foot, but was entitled to recover under a general clause granting monthly indemnity for insured wholly and continuously disabled by injury not resulting in a specific loss as detailed in the policy. Under Pacific Reporter key number Insurance 146 (1) the policy should be construed according to its character and its beneficent purposes in which the insured had sup-

posed it was understood and this Oregon case quotes with approval from the *National Life & Accident Ins. Co. v. Davies,* 34 Ala. Appeals 290, 39 So. (2d) 647, 700. Certiorari denied 252 Ala. 107, 39 So. (2d) 703. The Court said:

> "The policy should be construed according to its character and its beneficent purposes, and in the sense in which the insured had reason to suppose it was understood. It is not a question of what the words contained in the contract literally or figuratively mean, but instead what was their intended meaning when taken in connection with their use in the instrument."

And in *Manhein v. N. Y. Life Ins. Co.,* a La. App. case 1941, 5 So. (2d) 918, it was held that provisions in a life, health and accident policy should be given a liberal interpretation to the end that equity be done and that the underlying beneficent purposes of the contract not be rendered nugatory.

This rule of interpretation and construction has been followed in the case of *McKinney v. American Security Life Ins. Co.,* La. App. 1954, 76 So. (2d) 630, which construed and interpreted a definition of a hospital in the exact wording of the definition in the Reserve Life policies issued to Mary I. Marr. And in that case the facts were very analogous to the facts in the instant case. In the *McKinney* case the patient was necessarily confined for twelve days at McDonald Clinic which did not have x-ray equipment although the same was readily available through another doctor in a nearby town on a contract, and had a regis-

tered nurse only in the day time and a practical nurse at night, and otherwise the Clinic met all the requirements of the definition of a hospital in the policy. The Court said:

> "The intention of the parties is of paramount importance and must be determined in accordance with plain, ordinary and popular sense of the language used in the agreement and by giving consideration on a practical, reasonable and fair basis to the instrument in its entirety."

Citing the case of *Beard v. Peoples Life Ind. Life Ins. Co.,* 5 So. (2d) 340, and citing *Manhein v. N. Y. Life Ins. Co.,* 5 So (2d) 918. In the *McKinney* case the Court said it could not see how the insurance company was injured by the clinic having its x-ray work done in another town under contract. In the instant case the Jane O'Brien Hospital had a contractual arrangement with the Sacred Heart Hospital a block and a half away where any necessary major surgery could be done and in the language of the Louisiana Court I cannot see how the Reserve Life Ins. Co. was harmed by the Jane O'Brien Hospital using Sacred Heart surgery facilities rather than having its own room for surgery. *McKinney v. American Security Life Co.* is cited in the case of *Seguin v. Continental Service Life and Health Ins. Co.,* 89 So. (2d) 113, 230 La. 533; 55 A.L.R. (2d) 1014, a Supreme Court of Louisiana decision dated June 11, 1956, overruling 83 So. (2d) 789, where the *McKinney* case is cited in the dissenting opinion. Also cited with approval is *Beard v. Peoples Ind. Life Ins. Co. of La.,* 5 So. (2d) 340,

342. The citation of the *McKinney* case in the *Seguin* case is found on page 115 of 89 So. (2d) The case of *McKinney v. American Security Life Ins. Co.,* 76 So. (2d) 630, La. App. 1954, is quoted with approval in the case of *Pipes v. World Ins. Co. of Omaha,* reported in 150 Fed. Sup. 370, U. S. Dist. Ct. West. Dist. of La., decided on March 28, 1957, involves an action to recover disability benefits for sickness on a health and accident policy. In the 12th and 13th head notes on page 380 of 150 Fed. Sup. the Court said:

> "Louisiana Courts, in keeping with the teachings of our Civil Code (and the rule prevailing in all other jurisdictions, so far as we know) unfailing have held that, in cases of ambiguity in an insurance contract, any doubts as to the meaning of ambiguous words should be resolved against the insurer, and in favor of the insured. Provisions in a policy such as this should be given a broad, liberal interpretation so that the dominant, beneficent purposes of the contract will not be avoided where the doubts as to coverages, if such exist, were created by the insurer in drafting the terms of the policy."

On page 381 of 150 Fed. Sup. following the above quotation from the *Pipes* case there is this note, note (10),

> "McKinney v. American Security Life Insurance Company, Louisiana Appeals, 76 So. (2d) 630, 633, * * * The intention of the parties is of paramount importance and must be determined in accordance with plain, ordinary and popular sense of the language used in the agreement and

> by giving consideration on a practical, reasonable and fair basis to the instrument in its entirety."

Citing *Beard v. Peoples Ind. Life Ins. Co.,* 5 So. (2d) 340.

The Reserve Life policies taken out by Mary I. Marr are clearly distinguishable from the wording in the policy in the case of *Rew v. Beneficial Standard Life Ins. Co.,* 41 Wn. (2d) 577, 250 P. (2d) 956, 35 A. L. R. (2d) 891, as in the *Rew* case the wording was as follows:

> "The word hospital as used in this policy shall not include a rest, convalescent or nursing home."

In the *Rew* case there was specific exclusion of convalescent and rest homes and when the undisputed evidence showed that the insured was at the Valley View Convalescent Home, which was a convalescent home, both in name and in actuality, and was therefore excluded from the terms of the policy, and lower Court which had construed it as being a hospital under the terms of the policy was reversed. There is an annotation to this case in 35 A. L. R. (2d) 897 and that annotation with the A. L. R. Supp. Service gives most of the cases set out in Appellee's Brief. The Reserve policies, No. J and A taken out by Mary I. Marr have no such exclusion for psychiatric hospitals. In these Reserve policies the term "recognized hospital" is used and in the J policy on page 3 a definition of the word "hospital" is given and for this reason this case differs from the holding of the Supreme Court of Washington in the *Rew v. Beneficial Standard Life Ins. Co.* case.

And as the learned Judge in the District Court said in his oral opinion (R. 159):

> "Here it strikes me that, while the specific definitions are put in these policies, the company has not limited the hospital services to general hospitals and they have not limited it to hospitals certified by or accredited by any national association of hospitals or by an association of doctors; it is simply hospital and then with the definition that is added in the policies."

And the District Court went on to say in its oral opinion:

> "I also feel that it wasn't the intent of these parties, and it is not justified by the language of the policies, to say that the service was to be limited to the larger hospitals in any particular city. I can't conceive that even if a person lived in Spokane and purchased one of these policies that the policy might cover the hospitalization in Cheney or Davenport, but wouldn't cover the hospitalization in the identical type of institution in Spokane. I think that the policy has to be construed as referring to small towns and to cities equally here, and it is my view that there has been substantial compliance with the definitions as contained in the policy."

The Court will note that most of Appellant's evidence and most of Appellant's argument seems to be based on the theory that Plaintiff in the District Court had to prove that Jane O'Brien Hospital was a general hospital and had all of the necessary services and facilities that are required for membership in the American Association of Hospitals or the American Medical Association approved or certified hospitals.

If there were some wording in the policies under construction that would warrant such evidence or require it then this argument and this evidence of Appellant would be more pertinent and appropriate to this case.

The next few paragraphs will be devoted to replying to the cases cited by Appellant in his Brief.

American Ins. Co. of Tex. v. Brown, 222 P. (2d) 757; 203 Okla. 407 is a case involving a health and accident insurance policy and does hold that the insured must bring himself within the conditions of the policy in order to recover thereon, but it goes on to hold that a clause in a health insurance policy requiring that the disease from which the insured suffers originate over thirty days after the date of the policy to be within the coverage thereof, is strictly construed against the insurer and insured's illness or disability will be deemed to have its inception when the disease first becomes manifest or active or when distinct symptoms or conditions from which a physician can diagnose the disease with reasonable accuracy, exist. A jury verdict for the Plaintiff was affirmed by the Supreme Court of Oklahoma.

The case of *Cosgrove v. National Cas. Co.,* 177 Wash. 211; 31 P. (2d) 80, was an accident insurance policy with a clause excluding death on the public highway and the evidence showed that death was on the public highway and the insured was not allowed to recover. This case is comparable in its holding, to a certain extent, to the case of *Rew v. Beneficial Standard Life Ins. Co.,* 41 Wn. (2d) 577; 250 P. (2d) 956, previously referred to in this Brief.

The case of *Evans v. Metropolitan Life Ins. Co.,* 26 Wn. (2d) 594; 174 P. (2d) 961, is a case involving a life insurance policy and the case of *Green v. National Cas. Co.,* 87 Wash. 237; 151 P. 509, involves an accident which policy provided that if the insured got into a more hazardous occupation then the recovery should be less and the facts showed he did get into a more hazardous occupation.

The case of *Hamilton Trucking Service v. Automobile Ins. Co.,* 39 Wn. (2d) 688; 237 P. (2d) 781 and the case *Handley v. Oakley,* 10 Wn. (2d) 396; 116 P. (2d) 833 neither seem to have any particular application to the present case of *Reserve Life Ins. Co. v. Marr.*

The case of *Hesse v. U. S. Fidelity & G. Co.,* 21 P. (2d) 1090; 143 Ore. 700, is simply a case holding that there is no coverage under hospitalization policies after insured was transferred from a hospital to a home and appears to have no influence on the present case other than its rule of liberal construction which is quoted by Appellee in his argument.

Hospital Service Co. of Alabama v. Eubanks, 55 So. (2d) 755; 36 Ala. App. 338 is correctly quoted in Appellant's Brief and where the policy provided payments would be made only to bed-patients and the undisputed evidence showed that the insured stuck something in his foot and was treated as an out-patient and never as a bed-patient, it was rightly held that the policy did not apply to him and there could be no recovery.

The quotation on page 17 of Appellant's Brief from *Issacson Iron Works v. Ocean Acc. Ins. Corp.,* 191 Wash. 221; 70 P. (2d) 1026, stops in the middle of a sentence at a semi-colon. The complete quotation is,

> "The burden rested upon the respondents to show the loss which it suffered comes within the terms of the policy; while, on the other hand if the policy be ambiguous, such ambiguity should be construed in favor of the insured."

Kronstat v. Ass. Hospital Serv., 78 N. Y. S. (2d) 816 cited by Appellant is a case where the insurance policy, a hospital policy, had a provision requiring insured to be a registered bed-patient at a hospital and excluded the benefits while insured stayed at a boarding house, while under the treatment of a doctor.

Appellant on page 29 of his Brief refers to the case of *Kinney v. Am. Serv. Life Ins. Co.,* 76 So. (2d) 630, La. 1954. This case is correctly designated *McKinney v. American Security Life Ins. Co.,* 76 So. (2d) 630. Appellant tries to distinguish the facts of that case from the facts in the instant case, and although there are some differences they are not as stated by Appellant in his Brief. In the *McKinney* case the x-ray services, both the pictures and the interpretation, were done for the MacDonald Clinic at another town nearby, and there was the additional failure to comply strictly with the definition in the policy in that there was not a registered nurse on duty at all times, although there was a registeretd nurse in the day time and a practical nurse on duty at night. In the instant case surgery was available

at Sacred Heart Hospital a block and a half away, and is a similar situation to that of the x-ray pictures being taken and interpreted in another town rather than at the MacDonald Clinic in the*McKinney* case. However, the Jane O'Brien Hospital at Spokane, Washington, does have a registered nurse on duty at all times and in that respect the facts differed from the *McKinney* case, but the *McKinney* case construed a definition of a hospital identical to that contained in the two policies now under consideration. Certainly the hospital facilities at Jane O'Brien Hospital were at least equal to if not superior to those in the *McKinney* case and the Louisiana Court held that under the liberal interpretation of such hospital policies and the substantial performance that the Plaintiff was entitled to recover and that the institution was a hospital as defined in the policy, considering the policy as a whole.

On page 29 ofAppellant's Brief he again brings in the argument that this MacDonald Clinic in the *McKinney* case was considered and recognized as a general hospital in its area, whereas there was nothing in the *McKinney* case and nothing in the Reserve policies that said that either hospital had to be considered as a general hospital.

The case of *McNichols v. Denver,* 209 P. (2d) 910; 120 Col. 380, a Colorado case, defines a hospital.

In the case of *Miller v. Penn Mutual Life Ins. Co.,* 189 Wash. 269; 64 P. (2d) 1050, where that particular set of facts is applicable then the law as stated in the *Miller* case is correct.

It can be argued that there is ambiguity in the Reserve Life policy No. J448274, in as much as on the first page of the policy, the front of the policy, the following language is used,

> "If the insured * * * shall be necessarily confined within a recognized hospital"

And on page 3, paragraph 10 in the inside of the policy, the insurer defines the word "hospital" to mean an institution with certain facilities, whereas the term "recognized hospital" has been interpreted in several cases. It is not clearly apparent from the wording of Reserve policy whether the insured means that the word "hospital," the single word, is to be given a different definition from the two words "recognized hospital" on page 1 of the contract. This is more readily seen if there is a comparison of policy No. A448274 of the Reserve Life Ins. Co. as taken out by Mary I. Marr, where the following language is used in policy A,

> "If the insured * * * shall be necessarily confined within a recognized hospital (as defined in part 2 hereof)*, the company will pay the insured for the hospital, room expense * * *."

In the A policy the definition does refer to recognized hospital, whereas in the J policy it is not clear whether the term "recognized hospital" is defined or whether just the plain term "hospital" is defined.

The case of *Minear v. Benefit Ass'n Railway Employees,* 218 P. (2d) 244; 169 Kan. 199, is a case in-

volving insured's fraud in filling out an application for an insurance policy and thus does not seem to have any particular bearing or authority in this Brief.

National Bankers Life Ins. Co. v. Hornbeak, 226 S. W. (2d) 228; Tex. Civ. App. 1954, was a case involving a Dallas, Texas, hospital which was issued a license as a hospital under City Ordinances of Dallas, although it did not have any surgery, x-ray facilities or laboratory facilities, but the Court held that in the general sense of the word, and because the policy did not define what was meant by the word "hospital" or the words "recognized hospital" that this would be considered a "recognized hospital" and the insured was allowed to recover. In this Texas case the Dallas hospital was considered a "recognized hospital" even though its facilities were very much more inadequate than those of Jane O'Brien Hospital in Spokane, Washington. This case does show what can be considered a recognized hospital in Texas, the home state of the Appellant Insurance Company.

With the definition of a hospital in the Reserve Life policies this case apparently would be less controlling than the case of *McKinney v. Am. Sec. Life Ins. Co.,* 76 So. (2d) 630; La. App. Both the hospital in the *McKinney* case and the Jane O'Brien Hospital in the *Marr v. Reserve Life Ins.* case were equipped to offer services superior to that of the Dallas hospital in the *Hornbeak* case, just referred to, 266 S. W. (2d) 228 (Texas 1954).

Old Line Mutual Ins. v. Tilger, 264 S. W. (2d) 557, is a Texas case cited in Appellant's Brief for the proposition that the burden of proof was upon the insured to prove the happening of an event provided for in the policy. While this is true in a general way the case also holds that after the fundamentals of the policy have been proved by the Plaintiff that the burden is upon the Defendant to prove any limitation or exclusions in the policy. I believe in the instant case, that the definition of a hospital are limitations on the words "recognized hospital" on page 1 of Reserve policy J and that the burden would be on the insurance company to prove that the hospital in question, the Jane O'Brien Hospital, did not come within the definition of a hospital set out on page 3 of the J policy and on page 1 of the A policy taken out by Mary I. Marr in May, 1954.

The case of *Parker v. Rash,* 236 S. W. (2d) 687; 314 Ky. 609, is a Kentucky case involving zoning and holds that doctor's office building with treatment rooms and x-ray room, that was proposed to be built was not a hospital.

The case of *Rew v. Beneficial Standard Life Ins. Co.,* 41 Wn. (2d) 577; 250 P. (2d) 956; 35 A. L. R. (2d) 891, has already been discussed to some extent in Appellee's Brief. While this case does have a bit of obiter dictum from the trial Judge that the policy did not have a definition of a hospital, the Supreme Court of Washington decided the case on the basis of a positive and specific exclusion of convalescent and resting homes from the terms of the policy, and

not on what the trial Court said. This *Rew* case does not hold that where the policy defines what is considered a hospital that strict and literal proof of those conditions are necessary for the recovery of the insured. This seems to be Appellant's position in argument, both in the District Court and in the Circuit Court of Appeals here.

Richards v. Metropolitan Life Ins. Co., 184 Wash. 595; 55 P. (2d) 1067, involves a life insurance policy and the provisions from the case are correctly quoted by the Appellant in its Brief, but the case seems to add very little to the law applicable to the facts of the instant case.

The case of *Ross v. First American Ins. Co.,* 250 N. W. 75; 125 Neb. 329, is a Nebraska case decided in 1933, correctly stated in Appellant's Brief that where the policy specified that treatment had to be in an incorporated hospital and insured was taken to a small unincorporated hospital, that he was not entitled to hospital expenses because the class of hospital specifically specified in the policy was not attended by the insured while he was ill. Although the case holds that there was some reason for making the distinction since incorporated hospitals might be more stable and stronger, a check through Shepard's Citator for Northwestern Reporter System indicates no other case where this particular head note part of the *Ross* case has ever been quoted again, and apparently this is the only case so holding.

In *Starr v. Aetna Life Insurance Co.,* 41 Wash. 199;

83 P. 113, the general proposition set out in Appellant's Brief on page 17, is supported by this case; however, beginning at the bottom of pages 203 of 41 Wash. in the *Starr* case, the Court said:

> "It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies.
>
> "This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the supreme court of Alabama, in Equitable Accident Ins. Co. v. Osborn, 90 Ala, 201, 9 South. 869, 13 L. R. A. 267:
>
> " 'Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy.' "

The District Court has found that there was substantial performance even under the definition of a hospital in Reserve Life Ins. policies issued to Mary I. Marr. In Am. Jur., Vol. 12, page 900, Section

343C, entitled Substantial Performance and under section 343 generally, it says:

> "As stated above there is considerable authority as in support of the rule that a party must fully perform the stipulations on his part before the other party is obligated to perform, unless the promises are independent. A more liberal rule is, however, supported by much authority and the trend is toward this latter rule. Thus, it is said that the law looks to the spirit of the contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. Similarly, other courts state that substantial, and not exact performance accompanied by good faith is all the law requires in the case of any contract to entitle the party to recover on it."

Citing the following cases—*Woodruff v. Hough,* 91 U. S. 596, 23 L. ed. 332; *Newport v. Newport & C. Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484 and *Porter v. Trader Ins. Co.,* 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424, and the following cases cited in the pocket supplement to the same citation in 12 Am. Jur. on Contracts, Section 343, *Ambassador Bldg. Corp. v. St. Louis Amsterdam Theatre,* 238 Miss. App. 600, 185 S. W. (2d) 827, *Cracchiolo v. Carlucci,* 62 Ariz. 284, 157 P. (2d) 352, *Lautenbach v. Meredith,* 240 Iowa 166, 35 N. W. (2d) 870; *Winfield Mutual Housing Corp. v. Middlesex Concrete Products & Excavating Corp.,* 39 N. J. Super. 92, 120 A. (2d) 655 and *King v. Hintze,* 2 Utah (2d) 166, 270 P. (2d) 1095.

At the risk of citing cases already very familiar to this Court on the question of appeals from the United

States District Court to the Circuit Court of Appeals I believe that the following cases are pertinent besides numerous others: *Keller Products, Inc. v. Rubber Linings Corp.,* U. S. C. A. 7th Cir., 213 Fed. (2d) 382, 47 A. L. R. (2d) 1108. It was held on Appeal from the Federal District Court where the case was tried before the Court without a jury and judgment was based on the findings of the Court, that upon appeal from this judgment in an action for a trademark infringement and unfair competition in which the trial court found the issues in Plaintiff's favor, the Appellate Court is required to consider the evidence in the light most favorable to the Plaintiff. This same rule is true also where the appeal is based on a jury trial as set out in *Railway Express Agency c. Mackay,* U. S. Court of Appeals, 8th Cir., 181 Fed. (2d) 257, 19 A. L. R. (2d) 1284, also a number of cases cited under A. L. R. (2d) Series Digest, under Appeal and Error, Section 687, one of which is *Bryan v. Travelers Ins. Co.,* 8 A. L. R. (2d) 467, 32 Wn. (2d) 289, 201 P. (2d) 502, where the Court held a trial court's determination of factual issues will not be overturned on appeal unless Appellate Court is of the opinion that the preponderance of the evidence is against the Court's finding.

The case of *Ellis v. Brown,* 13 A. L. R. (2d) 945, 177 Fed. (2d) 667, holds a finding of fact by U. S. Dist. Ct. as binding on appeal to the United States Court of Appeals unless it is clearly erroneous.

Again in the *U. S. v. the First Sec. Bank of Utah,*

42 A. L. R. (2d) 951, 208 Fed. (2d) 424, the Court said:

> "It is not the function of the Court on appeal to weight evidence or to draw inferences therefrom; it may not retry doubtful issues of fact and substitute its judgment for that of the trial court."

Memorial Hospital Ass'n v. Pac. Great Products Co., 50 A. L. R. (2d) 442, 45 Cal. (2d) 634, 290 P. (2d) 481 can be summarized:

> "The power of an appellate court with the respect to the sufficiency of the evidence to sustain the judgment is limited to the determination of whether there is any evidence, contradicted, or uncontradicted, which would support the judgment rendered, and all reasonable inferences must be indulged to uphold it, if possible."

In the case of *Lassiter v. Atkinson Co.,* U. S. Court of Appeals, Ninth Circuit, decided August 24, 1949, reported in 176 Fed. (2d) 984, 21 A. L. R. (2d) 1313, it was held that the Appellate Court is prohibited under Rule 52A of the Federal Rules of Civil Procedure from setting aside the trial court's finding of fact, unless it is clearly erroneous, but if on the entire evidence, the Appellate Court was left with a definite and firm conviction that a mistake had been committed, it has the duty of reversing the trial court's findings, but the Appellate Court will not set aside the findings of the trial court if the Appellate Court is satisfied that the proof before the trial court was sufficient to warrant the trial court's inference and it cannot be said that the trial court's finding is clearly erroneous.

CONCLUSION

Jane O'Brien Hospital has been recognized as a hospital by the State of Washington, by the area it serves, and by the Appellant in 1955 when it paid the Reigart claim under Appellant's then hospital policy.

I respectfully submit that the Findings of Fact and Conclusions of Law, and Judgment of the Trial Court were supported by sufficient evidence and correctly construed the policies of insurance, and that the Judgment of the Trial Court should be affirmed and that Appellee receive its costs incurred on this appeal.

Respectfully submitted,

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